Supreme Court of the United States

October Term, 1943.

JEREMIAH J. SULLIVAN alias JERRY SULLIVAN,
Petitioner

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK.

Petition and Brief for a Writ of Certiorari to the Court of Special Sessions of the County of New York.

LOUIS HALLE,
Attorney for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1943.

JEREMIAH J. SULLIVAN alias
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AGAINST

THE PEOPLE OF THE STATE OF
NEW YORK.

Petition for a Writ of Certiorari to the Court of Special Sessions of the County of New York.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Jeremiah J. Sullivan, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Special Sessions of the County of New York, convicting him of the crime of coercion, upon which said judgment he was sentenced before the said Court on October 15, 1943 to the New York City Penitentiary for an indeterminate term, and which said judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York in and for the First Department, without opinion; the Presiding Justice of the said Appellate Division dissented and voted to reverse and to dismiss the information. Thereafter your petitioner

sought leave to appeal to the Court of Appeals of the State of New York, which court is the court of last resort of the said State, and said leave to appeal was denied on May 31, 1944, by Hon. Thomas D. Thacher, Associate Judge of the Court of Appeals of the State of New York.

And in support of his said petition your petitioner respectfully shows to this Honorable Court as follows:

A. Statement of the Matter Involved.

That on or about September 11, 1943 the District Attorney of New York County by direction of the grand jury of said county, filed an information containing 2 counts against your petitioner, charging him with the crime of coercion. Your petitioner was thereafter brought to trial in the Court of Special Sessions of the County of New York on September 27, 1943 before Hons. John V. Flood, Irving Ben Cooper and George B. DeLuca, Justices, and was acquitted as to the 1st count of the information and found guilty as to the 2nd count thereof. On October 15, 1943, your petitioner was sentenced to the New York City Penitentiary for an indeterminate term.

Thereafter, on or about February 7, 1944 your petitioner made a motion before the said Court of Special Sessions of the County of New York for a new trial on the ground of newly discovered evidence. The said motion was denied on March 2, 1944 (fols. 170-171). An appeal was taken from the judgment of conviction and from the order denying the motion for a new trial to the Appellate Division, First Department, which court affirmed the same without opinion; the Presiding Justice dissented and voted to reverse and to dismiss the information. Thereafter application was made before Hon. Thomas D. Thacher, Associate Judge of the Court of Appeals of the State of New York, for leave to appeal to the Court of Appeals from the said judgment and order, in accordance

with Section 520, subdivision 3 of the New York State Code of Criminal Procedure. The said application was denied on May 31, 1944, without opinion.

The facts on which the prosecution was based are as follows: There is an eating establishment known as Toots Shor's Restaurant; one Villegas was employed there as a bus boy; a certain union, known as the Hotel and Restaurant Workers Union, Local 16, A. F. L., was seeking to be selected as the bargaining agent for the employees (fols. 28, 29). The information charged that on August 21, 1943 the defendant threatened Villegas and sought to intimidate him with a view to compelling him to vote against that union as the bargaining agent of the employees "at an election before the New York State Labor Board" (fol 11).

From the manner in which this allegation of the information is phrased, it carries the clear implication and impression that an election had been ordered previous to said 21st day of August, 1943, the date of alleged coercion and intimidation, at which Villegas was eligible to vote, and that defendant sought by means of threats and force to compel him to abstain from voting at that election as he wished.

Your petitioner and his attorney, and, indeed, the trial court, assumed the verity of the allegation of the information that an election had been previously ordered by the New York State Labor Board and the trial proceeded accordingly. Shortly subsequent to the conviction of the defendant, your petitioner's attorney was at the office of the State Labor Board examining its file in connection with seeking information as to Villegas' eligibility to vote at the election purportedly ordered by the Board to be held to choose a bargaining agent for the employees, and in the course of such examination, for the first time discovered that no election had been ordered by the Board

previous to August 21, 1943, the date when the alleged coercion of said Villegas is charged to have been committed, or at any time prior thereto, and that such purported previously ordered election was in truth non-existent in fact, and that it was only on August 24, 1943, three days subsequent to the date of the commission of the alleged offense charged in the information that for the first time an election was ordered by the Board, the election being set for August 31, 1943. Following such discovery the motion for a new trial was made on this newly discovered evidence, which, as stated, was denied.

It is apparent that if no election had been ordered by the Board either immediately prior to August 21, 1943, or at any time prior to said date, that Villegas could not possibly have been coerced in his right to vote, for he manifestly was not eligible to vote and could not possibly be capable of voting at a non-existent election. Whatever supposition may have existed that an election had been previously ordered by the Board cannot change the actual fact that no election had been so ordered; therefore, factually and legally, the defendant could not commit the crime charged in the information.

B. Question Presented.

The sole question presented is:

Was the conviction of petitioner in accordance with due process of law as required by the Fifth and Fourteenth Amendments to the United States Constitution, or was the said conviction in violation of the due process of law clauses of said amendments?

C. Reasons Relied on for the Allowance of the Writ.

Your petitioner contends that he was convicted and is presently imprisoned for the commission of a crime which it was impossible for your petitioner to commit. The Fourteenth Amendment to the United States Constitution

sets forth that the laws must be applied in the same manner to all individuals.

Petitioner was tried for the crime of coercion in that

> "on or about August 21, 1943 * * * with a view of compelling one Louis Villegas to do an act which the said Louis Villegas had a legal right to abstain from doing, wrongfully and unlawfully used and attempted the intimidation of the said Louis Villegas by threats and force, in order that the said Louis Villegas should vote against the Hotel and Restaurant Workers Union, Local 16, A. F. of L. as the bargaining agents for the employees of Toots Shor's Restaurant at an election before the New York State Labor Board" (fol. 11).

The information and the trial proceeded on the theory that an election had been ordered at the time the coercion was allegedly practiced, and that Villegas had had the right to vote at such election; when it thereafter developed that no election had ever been ordered on August 21, 1943, the date of the alleged coercion, but that said election was only ordered on August 24, 1943, to be held on August 31, 1943, it became apparent that the crime of coercion could not have been committed, as charged in the information, since the coercion statute of the Penal Law of the State of New York (Sec. 530) expressly relates to a compulsion with respect to an individual's *legal right* which he then has. The legal right on which the prosecution proceeded was the right to vote at an election before the New York State Labor Board, and since there was no such election either ordered or in existence at the date of the alleged coercion, it follows that your petitioner could not have exercised any compulsion or intimidation with respect to a legal right of Villegas.

Furthermore, a conviction of your petitioner for the crime of an attempt to commit coercion would likewise be invalid for the reason that the wording of the coercion statute (set forth in brief) is such that in order to convict a person of attempted coercion it must be with respect to a *legal right*. This legal right was not in existence at the time that the crime is alleged to have been committed.

Your petitioner verily believes that this application presents a case cognizable under the rules of this Honorable Court and one eminently proper for review by this Honorable Court because of the fact that your petitioner stands imprisoned for the crime of coercion, which it was impossible for him to have committed as alleged in the information. Certainly such an individual should be extended the protection of the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Special Sessions of the City of New York, County of New York, in the State of New York, commanding that court to certify and to send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause, and to stand to and abide by such order and direction as to this Honorable Court shall seem proper, and the circumstances of the case require, and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, August 11, 1944.

LOUIS HALLE,
Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943.

JEREMIAH J. SULLIVAN alias JERRY SULLIVAN,
Petitioner,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK.

Brief in Support of Petition for Writ of Certiorari.

POINT I.

The Matter Involved Is of Outstanding Public Interest.

It is respectfully submitted that it is a matter of outstanding public interest to see to it that an individual should not be convicted and imprisoned for a crime which it was impossible for him to commit or even to have attempted to commit. The statute under which the petitioner Sullivan was tried is Section 530 of the New York State Penal Law, which reads as follows:

> "SECTION 530. COERCING ANOTHER PERSON A MISDEMEANOR.
>
> A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,
>
> 1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor."

It would appear from a reading of this statute that the individual accused of the crime must have sought to compel another person to do an act which such other person had a *legal right* to do or abstain from doing. Unless such a legal right is in existence at the time of the alleged coercion, there can be no crime under this section. The three paragraphs of the statute, numbered 1, 2 and 3, simply indicate the manner in which the coercion can be exercised. The gist of the statute, however, is found in the opening paragraph thereof, in the words "legal right".

It is undisputed from the record herein that the alleged coercion was practiced on August 21, 1943 with respect to Villegas' alleged legal right to vote "at an election before the New York State Labor Board". Upon the trial before the Court of Special Sessions, there was never any doubt in the minds of the attorneys or of the Presiding Justices that the election referred to in the information had been held or called prior to the said date, August 21, 1943. This was clearly indicated by the testimony adduced by the prosecution. For example, the prosecution's first witness was Harold L. Luxemburg, a Senior Labor Relations' Examiner of the New York State Labor Relations Board. After some preliminary testimony, Mr. Luxemburg testified as follows:

"Q. In due course, then, an election was directed, is that so? A That's right" (fol. 29) * * *.

"Q. Under the heading of 'Bus Boys', will you see whether the name Louis Villegas appears as a

person eligible to vote that election? A. Such name appears" (fol 32).

Louis Villegas, the complaining witness, was questioned by Mr. Justice DeLuca in such a manner as to clearly indicate that the Presiding Justices assumed that the election had been held or ordered prior to the date of the alleged coercion. The following appears at folio 125:

> "Justice DeLuca: Did you propose to vote at that election?
>
> The Witness: Yes, sir.
>
> Justice DeLuca: Were you entitled to vote at that election?
>
> The Witness: Yes, entitled to vote, but didn't go."

It is further undisputed that at the time the crime of coercion is alleged to have been committed, namely: August 21, 1943, the election referred to had not yet been held, and, as a matter of fact, had not even been ordered to be held. It was not until August 24, 1943 that the New York State Labor Relations Board ordered the election referred to in the information, to be held on August 31, 1943. Obviously if the election had not been ordered or held on August 21, 1943, it must follow that Villegas at that time had no *legal right* which could be the subject of coercion. If Villegas had no legal right to vote at the election on the date referred to in the information, then under the wording of the coercion statute it was impossible for Sullivan to have committed the crime of coercion.

It further cannot be claimed by the District Attorney that in any event Sullivan was guilty of an attempt to commit coercion since the prosecution would still be bound by the wording of the statute. In order to convict Sullivan of an attempted coercion, the prosecution would still be compelled to prove the existence of a "legal right" which Villegas had on August 21, 1943. Whether the acts

complained of would constitute an attempt, or the completed crime, would depend solely upon the effect of the acts charged upon Villegas.

In order for the prosecution to obtain a valid conviction in the case at bar, it was incumbent that a *legal right* to vote at the election referred to must have been in existence on August 21, 1943. If that had been the fact and Sullivan had then sought to intimidate Villegas so as to vote a particular way at the election, then two results could have followed. If Villegas had been intimidated and had voted at the election as directed by Sullivan, the completed crime of coercion would have been committed. If, on the other hand, Sullivan's attempt to intimidate Villegas did not succeed and Villegas voted at the election in any manner that he saw fit, then the crime of attempted coercion might have been charged. But in either event, in the completed crime of coercion, or the crime of attempted coercion, there must be the *legal right* in existence at the time the intimidation was practiced.

This Court has held that an act must be an offense at the time it is committed, and cannot become an offense by later acts of a third party.

In the case of *United States* v. *Fox*, 24 L. Ed. 538, 95 U. S. 670, this Court stated at page 671:

> "Upon principle, an act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection."

This rule was followed in the cases of

United States v. *Dietrich*, 126 Fed. 676;
Terry v. *United States*, 131 Fed. (2d) 40.

See also

People v. *Berg*, *People* v. *Levin*, 228 App. Div. 433, 239 N. Y. Supp. 670,

decided by the Appellate Division of the State of New York.

POINT II.

The constitutional question presented here was duly raised in the state courts.

It is respectfully submitted that the applicable rule with respect to raising the constitutional question in the state courts as gathered from the decisions of this Court, does not require that petitioner, in order to be entitled to a review by this Court of the question whether or not his conviction and imprisonment was in accordance with due process, must have specifically invoked the protection of the United States Constitution in *haec verba*. All that the rule requires is that the question sought to be considered by this Court should have been raised in the state court.

There is no question but that petitioner raised the question sought to be reviewed here before the Trial Court and the Appellate Courts of New York State. Immediately upon the discovery of the new evidence indicating that petitioner had been convicted of a crime which it was impossible for him to have committed, a motion for a new trial was made before the same judges of the Court of Special Sessions, New York County, who had presided at the trial. Upon the denial of this motion an appeal was taken to the Appellate Division, First Department, where the same question was raised. Upon the affirmance of the judgment of conviction and of the order denying the motion for a new trial, petitioner sought leave to appeal to the Court of Appeals, basing his argument before Hon. Thomas D. Thacher, Associate Judge of the Court of Appeals, upon the ground that petitioner had been convicted of a crime which it was impossible for him to have committed

Counsel submits that this case is a proper one for the allowance of a writ of certiorari since in the alternative

the petitioner is being deprived of his liberty without due process of law. Petitioner had the vested legal right to have been tried in accordance with the laws of the State or Federal Government, and if he was charged with an offense, it was incumbent upon the prosecution to prove that he committed the offense within the wording of the statute that he is charged with having offended. When it appears, as it does from the record in this case that the petitioner could not have committed the crime charged, then it is clear that he has been deprived of his liberty without due process of law, and for such a deprivation this Court should take jurisdiction of the matter in order to afford petitioner his legal remedy. As was stated by this Court in the case of

> *Marbury* v. *Madison*, 1 Cranch 163, 2 L. Ed. 69:
>
> "The government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Conclusion.

This case is clearly one in which the public interest requires a full review by this Court. A writ of certiorari should therefore be granted so as to bring this case before this Court for a full argument of the questions involved, so that this Court may pass upon the very serious and grave questions presented, and render judgment accordingly.

Respectfully submitted,

Louis Halle,
Attorney for Petitioner,
225 Broadway,
New York, N. Y.

No. 381

Supreme Court of the United States

October Term, 1944

JEREMIAH J. SULLIVAN, alias JERRY SULLIVAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

BERNARD L. ALDERMAN
ALAN J. ELLIOT
Deputy Assistant District Attorneys
Of Counsel

September, 1944

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

RESPONDENT'S BRIEF

Proceedings Below

The petitioner was convicted of the crime of COERCION (Penal Law, § 530) on October 15, 1943, in the Court of Special Sessions of the City of New York, New York County (129).* Several months thereafter, on March 2, 1944, his motion to set aside the judgment of conviction and for a new trial on the ground of newly discovered evidence was denied by the same court (170-1).

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, the judgment of conviction and order denying the motion for a new trial were affirmed without opinion, MARTIN, *P. J.*, dissenting and voting to reverse and dismiss the informa-

* References are to folios in the printed record on appeal to the Appellate Division of the Supreme Court of the State of New York, First Department.

tion (267 App. Div. 979). On May 31, 1944, leave to appeal to the Court of Appeals of the State of New York was denied by THACHER, *J.*, a judge of that Court (Code Crim. Proc., § 520, subd. 3).

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended [28 U. S. C. A., § 344 (b)] upon the claim that the petitioner was denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States (Petition, p. 4; Petitioner's Brief, pp. 11-12).

Statute Involved

Section 530 of the Penal Law—which defines the crime of Coercion—reads, in so far as herein applicable, as follows:

> "A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,
>
> * * *
>
> "3. Uses or attempts the intimidation of such person by threats or force,
>
> "Is guilty of a misdemeanor."

Facts

On August 17, 1943, the petitioner—by the use of force and violence—sought to influence a bus boy employed in Toots Shors' Restaurant, located in New York County, to vote against a certain union as the collective bargaining representative of the employees of the restaurant. As a consequence, he was tried and convicted of the crime of coercion on an information which charged that (11)

> "on or about August 21, 1943 * * * with a view of compelling one Louis Villegas to do an act which said Louis Villegas had a legal right to abstain from doing,

> [he] wrongfully and unlawfully used and attempted the intimidation of the said Louis Villegas by threats and force, in order that the said Louis Villegas should vote against the Hotel and Restaurant Workers Union Local 16, A. F. of L. as the bargaining agent for the employees of Toots Shor's Restaurant at an election before the New York State Labor Board."

Several months after his conviction, the defendant moved for a new trial on the ground of newly discovered evidence. In his motion papers, he asserted that it had recently been discovered that on August 17, 1943—the date of the alleged acts of coercion—no election had in fact been ordered by the New York State Labor Relations Board (195, *et seq.*). Then, maintaining that he had been charged with unlawfully seeking to influence Villegas to vote at an election ordered by the Board (184-5), he urged that Villegas could not "as a matter of fact or law have been coerced with respect to casting a vote at an election which at the time had not been ordered and was non-existent" (197).[1]

In opposition to the motion, the People contended that Villegas' legal right to vote at an election of his collective bargaining representative existed as of August 17, 1943, despite the fact that no election had—as of that time—been ordered by the Board (238-9). This position was sustained by the trial court and, thereafter, by the Appellate Division (267 App. Div. 979).

I

No federal question is presented to this Court.

The only question raised by the petitioner is the construction of Section 530 of the New York State Penal Law,

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1. We note that although the motion was made on the ground of newly discovered evidence, it actually was a claim that the People had failed to prove an essential element of its case—namely, that Villegas had been coerced with respect to an existing legal right.

defining the crime of coercion. It is the petitioner's contention that, under such law, no person can be convicted of coercing another with respect to his right to vote in a Labor Relations Board election unless the date of that election has actually been set by the Board. The courts of New York State have decided against the petitioner on this question. Even assuming the state courts to have been wholly wrong in their decision, such error could present no federal question to this Court.

See: *Buchalter* v. *New York* (1943) 319 U. S. 427, 429-430;
Enterprise Irrigation District et al. v. *Farmers Mutual Canal Company et al.* (1917) 243 U. S. 157, 166;
McDonald v. *Oregon Railroad and Navigation Company* (1914) 233 U. S. 665, 669-670;
Castillo v. *McConnico* (1898) 168 U. S. 674, 680;
Central Land Company v. *Laidley* (1895) 159 U. S. 103, 112;
Sayward v. *Denny* (1895) 158 U. S. 180, 186;
Snell v. *Chicago* (1894) 152 U. S. 191, 198-199.

As this Court stated in the *Buchalter* case, *supra*, 319 U. S. 427, 429-430:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of

a decision in this court every ruling made in the course of a trial in a state court."

We do not, of course, concede that the state courts did err in their interpretation of the state statute. On the contrary, we quite agree with Judge THACHER's determination that the petitioner's arguments were so unsubstantial as not even to warrant consideration by the Court of Appeals (Code Crim. Proc., § 520, subd. 3). However, as the merits of the petitioner's claims are not before this Court, we shall not discuss them.

II

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

BERNARD L. ALDERMAN
ALAN J. ELLIOT
Deputy Assistant District Attorneys
Of Counsel

September, 1944.